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No. 82-611

IN THE

Supreme Court of the United States

October Term, 1982

RAYMOND J. DONOVAN,
SECRETARY OF LABOR,

Appellant,

v.

DOROTHY BLITZ,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

APPELLEE'S MOTION TO DISMISS THE APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM THE JUDGMENT OF THE DISTRICT COURT

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QUESTIONS PRESENTED

1. Whether the Court should dismiss the appeal, rather than vacate the judgment below, where the case has become moot because appellant complied with the district court's order and did not seek a stay.

2. Whether the district court properly rejected a narrowing construction of the challenged statute which was contrary to the plain language and legislative history of the statute.

3. Whether the district court properly held that appellee was not required to exhaust administrative remedies where the existing remedies were not applicable to the controversy, exhaustion would have been futile, no facts were in dispute, and the sole issue was the constitutionality of the challenged statute.

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ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

APPELLEE'S MOTION TO DISMISS THE APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM THE JUDGMENT OF THE DISTRICT COURT

Appellee respectfully moves the Court to dismiss the appeal. This case is moot because appellant complied with the district court's injunction and provided appellee with all the relief she sought. Since the case has become moot through appellant's actions rather than through circumstances over which he had no control, the Court should dismiss the appeal rather than vacate the judgment below, as appellant requests. However, if the Court decides to vacate the judgment, it should not order dismissal of the complaint because appellee's application

for attorney's fees is pending before the district court. In the alternative, if the Court concludes that the case is not moot, appellee moves the Court to affirm the judgment of the district court on the ground that it is so clearly correct that it requires no further argument.

STATEMENT

Appellant's statement of the case omits several points which are pertinent to a proper understanding of this case. First, the amendment which provoked this controversy was enacted for the express purpose of excluding appellee from a job training program conducted under the Comprehensive Employment and Training Act of 1973 (CETA). It is because the legislative debate focused exclusively on appellee that the district court referred to the amendment as the "Blitz amendment." Second, appellant's inaction prior to commencement of this suit belies his argument that his narowing construction of the amendment would have made this litigation unnecessary. When the Blitz amendment was first enacted, he failed to answer the request of the Virginia Employment Commission (VEC) for guidance, and later he ignored appellee's request for assistance before she filed suit. Third, when the district court ordered appellant to provide the relief appellee requested, appellant did not seek a stay of the injunction but promptly complied with it. Fourth, there is presently pending in the district court an application for attorney's fees. Fifth, appellee recently has applied to another federally funded job training program.

In May 1980, Mrs. Blitz enrolled in a CETA program conducted by the VEC in Martinsville, Virginia. Appendix to Jurisdictional Statement (hereinafter "App.") at 2a.

Appellee is a member of the Communist Workers Party. (*Id.*) She believes that the United States government will one day be overthrown because in her view it does not serve the interests of the American people. (App. at 4a.) She also believes that only the American people will be able to overthrow the government and that they will do so when it becomes evident that it is in their best interests to do so. (*Id.*) Appellee believes that this revolution may have to be accomplished by force, if necessary, and that the American people have an inalienable right to such a revolution as a defense to governmental oppression. (*Id.*) However, she does not advocate and has never advocated violent revolution at the present time because the majority of Americans do not yet understand that revolution, violent or otherwise, is in their best interests. (*Id.*)

On November 13, 1980, Congressman Dan Daniel of Virginia, in whose congressional district appellee then resided, introduced a bill to amend the Comprehensive Employment and Training Act to bar participation by any person "who publicly advocates the violent overthrow of the United States Government or has so advocated such a course of action within the past five years." H.R. 8339, 96th Cong., 2d Sess. (1980). Congressman Daniel stated that he was introducing this bill because he recently had learned that Mrs. Blitz and her husband were members of the Communist Workers Party and were enrolled in a CETA training program in his district. 126 Cong. Rec. H10572 (daily ed., Nov. 13, 1980). He stated that he did not believe "that it was the intention of Congress that individuals whose stated policy is the overthrow of our system be the beneficiary [sic] of that system." *Id.*

On December 11, 1980, Senator Hollings introduced a variation of Congressman Daniel's bill as an amendment

to a continuing resolution to provide funding for the Department of Labor. 126 Cong. Rec. S16192 (daily ed., Dec. 11, 1980). Senator Hollings stated that he was introducing the amendment at the request of Congressman Daniel and Senator Byrd of Virginia for the specific purpose of excluding appellee from the CETA program. *Id.*[1] In support of the amendment, Senator Hollings cited three fragmentary press clippings from the *Martinsville Bulletin* which identified Mrs. Blitz by name and indicated that she believes in the overthrow of the government and that such a revolution might necessarily be violent. *Id.* The Senate adopted Senator Holling's amendment by unanimous consent. *Id.*

The following day, Congressman Daniel addressed the House to express his satisfaction that the Senate had adopted the Blitz amendment and his hope that the House conferees would accept it. 126 Cong. Rec. H12386 (daily ed., Dec. 12, 1980). At that time, he once again made clear that the amendment was aimed at appellee. *Id.* Although the House conferees initially accepted the Blitz amendment, *see* 126 Cong. Rec. S16742 (daily ed., Dec. 15, 1980), it was not passed in 1980 because all riders to the continuing resolution were ultimately eliminated in order to secure agreement in the closing hours of the 96th Congress. 126 Cong. Rec. S16585 - S16589, H12537 - H12547, S16727 - S16745 (daily ed., Dec. 15, 1980). However, Senator Warner of Virginia made a last-minute effort in the pre-dawn hours of December 16, 1980 to restore the amendment after it had been eliminated by the House and Senate conferees. 126 Cong. Rec. S16742 - S16744 (daily

[1]Congressman Daniel had been unable to introduce such an amendment when the resolution was before the House because the resolution was considered under a procedure which did not permit any amendments. 126 Cong. Rec. H12386 (daily ed., Dec. 12, 1980).

ed., Dec. 15, 1980). Once again, a proponent of the amendment made it absolutely clear that his intention was to exclude Mrs. Blitz from the CETA program. *Id.* at S16742 - S16743. Senator Warner withdrew his amendment only after receiving assurances from the majority and minority leaders of the Senate that the Blitz amendment would be given prompt consideration in the 97th Congress. *Id.* at S16743 - S16744.

On October 6, 1981, Congressman Daniel introduced the Blitz amendment to the 1982 Department of Labor appropriations bill. 127 Cong. Rec. H7089, H7097 (daily ed., Oct. 6, 1981). The House adopted the amendment by voice vote without any debate. *Id.* On November 19, 1981, the Senate Committee on Appropriations reported the 1982 appropriations bill for the Department of Labor, which included the Blitz amendment. H.R. 4560, 97th Cong., 1st Sess. § 514 (1981). Under the terms of Public Law 97-92, 95 Stat. 1183 (Dec. 15, 1981), a continuing resolution providing funds for, *inter alia,* the Department of Labor, the Blitz amendment was enacted into law on December 15, 1981, and has been twice re-enacted through subsequent continuing resolutions. *See* Jurisdictional Statement (hereinafter "J.S.") at 3 n.2.[2]

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[2]There are two legislative developments of which the Court should be aware, although appellee does not believe that they make this case moot. First, the Comprehensive Employment and Training Act expired on September 30, 1982, at the end of the 1982 fiscal year, 29 U.S.C. § 822(a)(1) (Supp IV), and was replaced by the Job Training Partnership Act, Pub. L. No. 97-300, 96 Stat. 1322 (Oct. 13, 1982). The most recent continuing resolution extending the Blitz amendment makes funds that were available under CETA available under the Job Training Partnership Act. Pub. L. No. 97-276, § 162, 96 Stat. 1186, 1204 (Oct. 2, 1982). Accordingly, the funds appropriated for the new job training act continue to be restricted by the Blitz amendment.

(cont'd)

In May 1981, before completing her training program, Mrs. Blitz was given a leave of absence because she was pregnant. (App. at 2a.) After her child had been born, appellee re-applied to the CETA program on January 20, 1982, in order to finish the training she had begun. (App. at 3a.) Appellee was informed by an official in the Martinsville office of the VEC that she was eligible for the program but for the uncertainty created by the recently enacted amendment. (*Id.*) She was further informed that the VEC was awaiting guidance from the Virginia Attorney General. (*Id.*) On January 24, 1982, appellee wrote to the Virginia Attorney General asking him to clarify the uncertainty over her eligibility. (*Id.*) On February 15, 1982, an attorney in the office of the Virginia Attorney General informed appellee that the United States Department of Labor had declined to provide guidance to the state and that the state was still considering its position. (*Id.*) Thereafter, on February 18, 1982, the VEC issued a regulation requiring all applicants to state whether they have within the past five years advocated the violent over-

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Thus, we do not understand appellant to argue that this case has become moot by virtue of the expiration of CETA.

Second, the current continuing resolution enacting the Blitz amendment expires on December 17, 1982. Pub. L. No. 97-276, § 102, 96 Stat. at 1190. However, the Job Training Partnership Act has a transitional provision which states that "the Secretary, from funds appropriated pursuant to this Act or pursuant to the Comprehensive Employment and Training Act, shall provide financial assistance under this Act in the same manner that such assistance was provided under the Comprehensive Employment and Training Act (as in effect on the day before the enactment of this Act) until September 30, 1983." Pub. L. No. 97-300, § 181(a), 96 Stat. at 1354. Thus, it appears that even if the current continuing resolution is not extended beyond December 17, 1982, eligibility for programs under the Job Training Partnership Act will continue to be restricted by the Blitz amendment until September 30, 1983, and the case will not be rendered moot by the expiration of Pub. L. 97-276.

throw of the government. (*Id.*) When this regulation was brought to appellee's attention on February 26, 1982, she refused to answer the question. (App. at 4a.)

Before appellee filed suit, her counsel requested the Secretary of Labor to direct the VEC to process appellee's application without regard to her political beliefs. These requests were made orally on February 26, 1982, and in a letter hand-delivered to the Department of Labor on March 4, 1982. (Affidavit of Mark H. Lynch, March 11, 1982.) When these entreaties produced no response, appellee filed suit on March 11, 1982.

Although the Secretary of Labor announced his narrowing construction in his motion to dismiss in the district court, he took no steps to inform the VEC or any other prime sponsor that the Blitz amendment was to be so interpreted. (App. 9a-10a.) However, when the district court ordered the Secretary to undertake appropriate steps to insure that appellee's application was processed without regard to her political affiliations or beliefs, he did not seek a stay of the injunction and complied with it. (Appendix A, *infra*). Consequently, appellee was re-admitted to the training program and completed it in June 1982.

Although the controversy over appellee's participation in the job training program has become moot, ancillary proceedings in the district court are still under way. On June 16, 1982, appellee filed a timely application for attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412 (Supp. IV), and the district court has not yet ruled on that application.

Appellee and her family have now moved to New York City. Appellee has informed counsel that she has applied to a federally funded job training program there, and that

she has completed the orientation phase of the application process. She anticipates that she will undergo the assessment phase of the application process in January 1983 and shortly thereafter begin an on-the-job-training program in the same trade she studied in Virginia. Appellee has not encountered any difficulty with this application on account of the Blitz amendment.

ARGUMENT

I. THE APPEAL SHOULD BE DISMISSED.

The parties are in agreement that the case is moot because appellant complied with the district court's injunction and provided appellee with all the relief she sought. However, the parties are in disagreement over the appropriate disposition of the case. Appellant asks the Court to vacate the judgment of the district court and remand the case with instructions to dismiss the complaint as moot. Appellee submits that the Court should dismiss the appeal.

When an appeal of a lower court decision becomes moot "through happenstance," this Court ordinarily vacates the judgment and remands with a direction to dismiss the complaint. *United States v. Munsingwear,* 340 U.S. 36, 39-40 (1950). However, this procedure is not appropriate when the case becomes moot because of the appellant's actions.

> If the circumstances which rendered the case moot, after the judgment in the trial court, are due to circumstances over which appellant had no control, then the Supreme Court has, in some circumstances, in order to avoid unfairness, reversed and remanded with directions to the trial court to dismiss the suit instead of dismiss-

> ing the appeal. But that is not the invariable practice. And we think that it is not the proper course here. This case has not become moot because of intervening circumstances over which appellant had no control. It resembles one where, after an appeal is taken, the defeated plaintiff settles and compromises the action or executes a release of his right to appeal . . . . [D]ismissal of the suit, as distinguished from dismissal of the appeal, might result in unfairness to appellee by subjecting him to other vexatious actions by appellant.

Cover v. Schwartz, 133 F.2d 541, 546-47 (2d Cir.), *cert. denied*, 319 U.S. 748 (1943) (footnotes omitted). Similarly, in *Ringsby Truck Lines v. Western Conference of Teamsters*, 686 F.2d 720 (9th Cir. 1982), the court found "the distinction between litigants who are and are not responsible for rendering their case moot at the appellate level persuasive," *id.* at 721, and held that dismissal of the appeal rather than dismissal of the action is the proper procedure when the appellant is responsible for the mootness. *Id.* at 722. *Cf. Mills v. Green*, 159 U.S. 651, 653 (1895).[3]

In this case, appellant made no effort to preserve the status quo by seeking a stay of the district court's injunc-

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[3] *But see New Left Education Project v. Board of Regents of the University of Texas System*, 472 F.2d 218 (5th Cir.), *vacated*, 414 U.S. 807 (1973). In that case, the court of appeals followed the reasoning in *Cover v. Schwartz* and dismissed the appeal without vacating the judgment of the district court. This Court then issued an order vacating the judgment and directing the complaint to be dismissed. Although there was no explanation for that disposition, it may have been influenced by considerations of federalism since the district court's order had the effect of enjoining a state court proceeding over the same subject matter. *See* Petition for a Writ of Certiorari, *Board of Regents v. New Left Education Project*, No. 72-1485.

tion. Instead, he promptly directed the VEC to admit appellee to the training program. (Appendix A, *infra.*) Where a party fails to seek a stay of a district court's order and complies with a mandatory injunction, he sacrifices his right to appeal and cannot expect to reap the benefits of an appeal.[4] Furthermore, if the government's compliance with a mandatory injunction entitled it to have the district court's judgment vacated, such a rule would permit the government to litigate the merits of a case fully and then, having lost, undermine the precedential and preclusive effect of the judgment by compliance as to the plaintiff while continuing to maintain a general posture deemed illegal by the district court. Such a doctrine would be wholly inconsistent with basic conceptions of the rule of law, *see Cooper v. Aaron,* 358 U.S. 1, 18-19 (1958), to say nothing of modern notions of res judicata and collateral estoppel. *See Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979).[5]

The practical equities in this case present particularly compelling reasons for dismissing the appeal rather than vacating the district court's judgment. Mrs. Blitz has applied to a job training program in New York City, and the funds for that program are subject to the Blitz amendment. *See* note 2, *supra.* Since appellee has not en-

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[4]*See, e.g., Curtis v. Taylor,* 625 F.2d 645, 648, 653 (5th Cir. 1980); *Matter of Combined Metals Reduction Co.,* 557 F.2d 179, 187-88 (9th Cir. 1977); *Taylor v. United States,* 410 F.2d 392 (5th Cir. 1969); *Bingham v. Yingling Chevrolet Co.,* 297 F.2d 341 (10th Cir. 1961).

[5]The disposition appellant seeks would also encourage plaintiffs in cases such as this to bring class actions as insurance against the strategy appellant has followed here. Litigation over class certification and the separate questions of mootness in class actions would only increase costs to litigants and demands on the courts.

countered any difficulty in New York and her application is not yet completely processed, she is not faced with any ripe controversy under the Blitz amendment.[6] However, if any controversy should arise over her eligibility because of the amendment, the judgment of the district court will be very important to her, and she should not be forced to relitigate this case as a result of appellant's decision to forego his right to appeal.

This is precisely the situation envisioned by the court in *Cover v. Schwartz* when it stated that an appellee might be subjected to "vexatious actions by appellant" if the judgment of the district court were vacated. 133 F.2d at 547. "If the effect of post-judgment settlements were automatically to vacate the trial court's judgment, any litigant dissatisfied with a trial court's findings would be able to have them wiped from the books," *Ringsby Truck Lines, Inc. v. Western Conference of Teamsters, supra,* 686 F.2d at 721, and that appears to be appellant's strategy in this litigation. There is no reason "why appellant should be permitted to avoid the collateral estoppel effect of the district court's findings by settling this dispute on appeal and petitioning for vacation of the court's adverse findings." *Id.* at 721 n.1. Instead, whatever preclusive or precedential effect the district court's judgment may or may not have should be left to the court in which any subsequent dispute may be litigated. *Id.* at 722. *See Parklane Hosiery Co. v. Shore, supra,* 439 U.S. at 331.

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[6]Since there is no apparent likelihood that appellee will be barred from the New York program, the Blitz amendment is not causing any continuing impact on appellee which would warrant a finding that this case is not moot. *Compare, e.g., Super Tire Engineering Co. v. McCorkle,* 416 U.S. 115 (1974).

The government in other cases has taken the position that *"Munsingwear* should not be read to require this Court to vacate every judgment that becomes moot pending disposition of a petition for a writ of certiorari." Reply Brief for the Petitioner at 2, *SEC v. Board of Trade of the City of Chicago,* No. 82-526, *cert. granted, judgment vacated* (Nov. 29, 1982). Thus, in two cases where petitioners complied with grand jury subpoenas which the government had successfully enforced, the Court at the government's request denied the petitions for certiorari without vacating the judgments below. *Local 102, International Ladies' Garment Workers' Union v. United States,* 439 U.S. 1070 (1979) (No. 78-633); *Velsicol Chemical Corp. v. United States,* 435 U.S. 942 (1978) (No. 77-900).

In those cases, the government argued that a judgment should be vacated only when the Court would have granted the petition if the case had not become moot. On the other hand, if the Court would not have granted the petition, it should not disturb the judgment below. Brief for the United States in Opposition at 4-8, *Velsicol Chemical Corp. v. United States, supra,* No. 77-900; Memorandum for the United States in Opposition at 4 n.4, *Local 102, International Ladies' Garment Workers' Union v. United States, supra,* No. 78-633. In urging this approach, the Solicitor General emphasized the unfairness to the party who prevailed below:

> [A]ction by this Court vacating a judgment of the court of appeals on account of subsequent mootness, although that judgment would not otherwise have been reviewed, is unfair to the party that prevailed in the court of appeals. Such a result needlessly deprives the respondent of any collateral benefits that might inure to it from the judgment, while at the same time conferring

> upon the petitioner an undeserved windfall that it could not have secured if the controversy had remained alive until such time as this Court passed upon the certiorari petition.

Brief for the United States in Opposition at 6, *Velsicol Chemical Corp. v. United States, supra,* No. 77-900.

The unfairness of providing appellant with a windfall is even greater in this case than in *Velsicol* and *Local 102*. In those cases, the petitioners unsuccessfully sought stays of the lower court orders,[7] but here appellant complied with the district court's order without attempting to maintain the status quo. If an appellant wishes to erase a district court's judgment, he should be required to take the necessary steps to preserve the status quo pending appeal. If he fails to do so, he should be required to live with the consequences of that judgment.

Although *Velsicol* and *Local 102* arose on petitions for certiorari rather than on direct appeal, the procedure which the government urged in those cases should be adapted at least to appeals where the appellant fails to seek a stay and complies with the district court's order, for in such cases the appellant has voluntarily surrendered his right to appeal. Thus, if this case were not moot and the Court would affirm the judgment below pursuant to Rule 16, or for any other reason decline to note probable jurisdiction, it should dismiss the appeal. As we demonstrate at pp. 14-22, *infra,* the decision of the district court is so clearly correct that it would be affirmed if it were not moot. However, quite apart from any appraisal of

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[7]Petition for a Writ of Certiorari at 4, *Velsicol Chemical Corp. v. United States, supra,* No. 77-900; Petition for a Writ of Certiorari at 5, *Local 102, International Ladies' Garment Workers' Union v. United States, supra,* No. 78-633.

the merits, the Court should dismiss this appeal because appellant is responsible for the case being moot. *Ringsby Truck Lines, Inc. v. Western Conference of Teamsters, supra,* 686 F.2d 720; *Cover v. Schwartz, supra,* 133 F.2d 541.

If, contrary to appellee's submission, the Court decides to vacate the judgment of the district court, it should remand for consideration of appellee's application for attorney's fees rather than order dismissal of the complaint, as appellant requests. Appellee's application is now pending before the district court, and there is no reason to foreclose further proceedings on that issue. *Doe v. Marshall,* 622 F.2d 118, 120 (5th Cir. 1980), *cert. denied,* 451 U.S. 993 (1981) ("a determination of mootness does not prevent an award of attorney's fees on remand").

II. IN THE ALTERNATIVE, THE JUDGMENT OF THE DISTRICT COURT SHOULD BE AFFIRMED.

If the Court concludes that the case is not moot, it should affirm the judgment of the district court. In *Brandenburg v. Ohio,* 395 U.S. 444, 447 (1969), the Court held that the First Amendment does not permit the government "to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to produce such action. " *See NAACP v. Claiborne Hardware Co.,* 102 S. Ct. 3409, 3433-34 (1982); *Communist Party of Indiana v. Whitcomb,* 414 U.S. 441, 448 (1974). Since the Blitz amendment fails to draw "the critical line . . . between mere advocacy and advocacy 'directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action,'" *Healy v. James,* 408 U.S. 169, 188 (1972), it is unconstitutional on its face.

Appellant does not argue to the contrary. Instead he argues that the district court should have ruled in his favor because (1) he should be permitted to interpret the statute to conform with the distinction required by *Brandenburg*, and (2) appellee failed to exhaust her administrative remedies. Neither argument has any merit.

A. The Narrowing Construction.

The district court properly ruled that the Secretary of Labor does not have the authority to re-write a Congressional enactment in a fashion that contradicts the plain language and the clear intent of the statute. With simplicity and plainness, the Blitz amendment excludes from participation in CETA programs "individuals who publicly advocate the violent overthrow of the Federal Government, or who have within the past five years, publicly advocated the violent overthrow of the Federal Government."

Appellant contends that Congress intended this proscription on advocacy to go only so far as *Brandenburg* permits. However, there is nothing in the statute to support this gloss, and the legislative history is directly to the contrary. Throughout the congressional discussion of the Blitz amendment, its sponsors made clear that they intended to exclude individuals who advocate the violent overthrow of the government without any reference to whether they advocate imminent violence and are likely to succeed in their advocacy. Congressman Daniel said that he wanted to exclude "individuals whose *stated policy* is the overthrow of our system." 126 Cong. Rec. H10572 (daily ed., Nov. 13, 1980) (emphasis added). Senator Riegle stated: "We all have a very strong feeling about anyone who would advocate the overthrow of our Government, and we would oppose that *in all forms.*" 126 Cong. Rec.

S16743 (daily ed., Dec. 15, 1980) (emphasis added). *See* 126 Cong. Rec. S16192 (daily ed., Dec. 11, 1980); 126 Cong. Rec. H12386 (daily ed., Dec. 12, 1980).

Furthermore, the evidence presented to the Congress in support of the Blitz amendment did not involve any advocacy of the sort to which the Secretary suggests the statute is limited. All that was presented to the Congress was that Dorothy Blitz is a member of the Communist Workers Party and that she had been quoted in the press as believing that the government will have to be overthrown and this revolution might have to be by force if necessary. 126 Cong. Rec. S16192 (daily ed., Dec. 11, 1980); 126 Cong. Rec. H12386 (daily ed., Dec. 12, 1980); 126 Cong. Rec. S16742 (daily ed., Dec. 15, 1980).[8]

In arguing that the district court should have accepted his narrowing construction of the amendment, appellant has confused the canons of statutory construction. This Court has repeatedly emphasized that "the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). *See Griffin v. Oceanic Contractors, Inc.*, 102 S. Ct. 3245, 3250, 3253 (1982). The language of the Blitz amendment could not be

[8]Congressman Daniel also told the Congress that appellee had been indicted on felony riot charges in connection with the Ku Klux Klan attack on a Communist Workers Party demonstration in Greensboro, North Carolina. 126 Cong. Rec. H10572 (daily ed., Nov. 13, 1980). Those charges did not arise from advocacy of violent revolution, and in any event the charges were dismissed. Second Affidavit of Dorothy Blitz, ¶ 's 11, 12 (March 23, 1982).

clearer, and the legislative history is entirely consistent with the statutory language. On that score alone, the Secretary's extensive revision of the statute must be rejected as contrary to the most fundamental principle of statutory construction.

The Secretary also argues that his narrowing construction is necessary to avoid a repeal by implication of the provisions of CETA which prohibit discrimination among participants on the basis of political affiliation or belief. 29 U.S.C. §§ 823(a)(1) and 834(a) (Supp. IV). While the Secretary is correct in asserting that repeals by implication are not favored, he overlooks the companion rule that a court "must read the statutes to give effect to each if [the court] can do so while preserving their sense and purpose." *Watt v. Alaska,* 451 U.S. 259, 267 (1981). Under this principle, the logical way to give effect to both the anti-discrimination provisions of CETA and the Blitz amendment is to conclude that the statutory frame-work prohibits discrimination on the basis of political belief, except where an individual advocates the violent overthrow of the government. *See Morton v. Mancari,* 417 U.S. 535, 549-551 (1974) (reconciling an anti-discrimination provision with a hiring preference based on race).

The fact that this reconciliation raises a constitutional issue does not justify resorting to a construction which is contrary to the statute's plain language and legislative history. "[I]t is very clear that amendment may not be substituted for construction and that a court may not exercise legislative functions to save the law from conflict with constitutional limitation." *Yu Cong Eng v. Trinidad,* 271 U.S. 500, 518 (1926). Since the Secretary's construction of the Blitz amendment is not faithful to the statute's

language and the express congressional intent, the district court properly rejected it.[9]

Finally, the Secretary relies on the principle that courts should accept narrowing constructions in order to avoid ruling that statutes are unconstitutional.[10] While this policy should be given effect whenever possible, courts are not free to ignore the plain language of a statute and Congress' clear intention in enacting it. "[R]esort to an alternative construction to avoid deciding a constitutional question is appropriate only when such a course is 'fairly possible' or when the statute provides a 'fair alternative' construction." *Swain v. Pressley,* 430 U.S. 372, 378 n.11 (1977). As this Court stated in *United States v. Sullivan,* 332 U.S. 689, 693 (1948):

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[9]The Secretary also suggests that he has greater latitude to construe the Blitz amendment because it was enacted in an appropriations bill. This contention is rebutted by the decision in *United States v. Will,* 449 U.S. 200 (1980), where the Court confronted and decided novel and difficult constitutional issues which had been precipitated by legislation enacted through appropriations bills. "[W]hen Congress desires to suspend or repeal a statute in force, '[t]here can be no doubt that . . . it could accomplish its purpose by an amendment to an appropriation bill, or otherwise.' . . . 'The whole question depends on the intention of Congress as expressed in the statutes.'" *Id.* at 222 (citations omitted). Thus, the fact that the Blitz amendment was enacted in an appropriations bill does not excuse the district court from facing the statute's plain meaning, even if that meaning required an adjudication of a constitutional issue.

[10]The Secretary also asserts that he is entitled to deference in the interpretation of a statute which he is responsible to administer. While this is true with respect to matters of program operation, the Secretary's judgment "is of limited value when the narrow legal issue is one peculiarly reserved for judicial resolution." *Piper v. Chris-Craft Industries,* 430 U.S. 1, 41 n.27 (1977). Indeed, "the constitutionality of a statutory requirement . . . is beyond [a cabinet officer's] jurisdiction to determine." *Weinberger v. Salfi,* 422 U.S. 749, 765 (1975). *See Public Utilities Commission of the State of California v. United States,* 355 U.S. 534, 539-40 (1958).

> A restrictive interpretation should not be given a statute merely because Congress has chosen to depart from custom or because giving effect to the express language employed by Congress might require a court to face a constitutional question. [There is no authority for] a court in interpreting a statute to depart from its clear meaning. When it is reasonably plain that Congress meant its Act to prohibit certain conduct, no [authority] justifies a distortion of the congressional purpose, not even if the clearly correct purpose makes marked deviations from custom or leads inevitably to a holding of constitutional invalidity.

The district court's ruling on the constitutionality of the Blitz amendment was consistent with this Court's decision in an analogous case, *Aptheker v. Secretrary of State,* 378 U.S. 500 (1964). There the Court held unconstitutional a section of the Subversive Activities Control Act of 1950 which prohibited anyone who was a member of a Communist organization, as determined by the Subversive Activities Control Board, to use or apply for a passport. In reaching this conclusion the Court rejected an argument – similar to the one which appellant makes in the instant case – that the Court should apply a narrowing construction to the statute.

> It must be remembered that "[a]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . ." or judicially rewriting it. [citation omitted] To put the matter another way, this Court will not consider the abstract question of whether Congress might have enacted a valid statute but instead must ask

> whether the statute that Congress did enact will permissibly bear a construction rendering it free from constitutional defects.

378 U.S. at 515.

In this case, just as in *Aptheker,* "[t]he clarity and preciseness of the provision in question make it impossible to narrow its indiscriminately cast and overly broad scope without substantial rewriting." *Id.* The Blitz amendment does not present any problems of vagueness which might properly be cured by an administrative or judicial gloss. Its language and legislative history are perfectly clear and clearly unconstitutional. "It is precisely because [the] statute sweeps indiscriminately across all types of [advocacy], without regard to the quality and degree of [advocacy], that it runs afoul of the First Amendment." *United States v. Robel,* 389 U.S. 258, 262 (1967).[11] Since neither the Secretary of Labor nor the courts have the authority to engage in a legislative function, the district court properly ruled that the Blitz amendment is facially unconstitutional.[12]

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[11] In *Robel* the Court rejected the government's proffered narrowing construction with respect to another provision of the Subversive Activities Control Act of 1950.

[12] If accepted, the Secretary's narrowing construction would present a host of additional constitutional problems. First, it does not address appellee's contentions that the Blitz amendment is unconstitutional because it is a bill of attainder and because it retroactively penalizes speech which was legal when uttered. *See United States v. Brown,* 381 U.S. 437 (1965). Second, in order to determine whether a participant has engaged in proscribed advocacy, a prime sponsor would have to employ questions and investigations which would raise serious problems under the self-incrimination clause of the Fifth Amendment. *See Lefkowitz v. Cunningham,* 431 U.S. 801 (1977). Third, determinations with respect to arguably proscribed advocacy would raise difficult issues as to the measure of due process required before an administrative agency can punish a person. *See Mathews v. Eldridge,* 424 U.S. 319 (1976). Fourth, in order to accommodate participants in

B. Exhaustion of Administrative Remedies.

The Secretary of Labor asserts that appellee was not properly before the district court because she failed to exhaust her administrative remedies. This contention is without merit for three reasons.

First, the remedies prescribed by the statute, 29 U.S.C. § 816 (Supp. IV), and the regulations, 20 C.F.R. §§ 676.81-676.93 (1980), do not apply to the instant controversy because this grievance procedure applies only to complaints against prime sponsors. 29 U.S.C. § 816(a). It does not provide an avenue for a person who has a dispute directly with the Secretary over the constitutionality of any portion of the statute. *See CETA Workers' Organizing Committee v. City of New York,* 617 F.2d 926, 935 (2d Cir. 1980). Indeed, lower court decisions demonstrate that a plaintiff raising a constitutional issue under CETA need not exhaust administrative remedies and may present that claim to an appropriate district court. *Hark v. Dargon,* 477 F. Supp. 308 (D. Vt.), *aff'd,* 611 F.2d 11 (2d Cir. 1979); *Maloney v. Sheehan,* 453 F. Supp. 1131, 1136-1137 (D. Conn. 1978). *See CETA Workers' Organizing Committee v. City of New York, supra,* 617 F.2d at 934 n. 6.

Second, even if there were remedies for appellee to pursue in a controversy such as this, exhaustion should not have been required because it would have been futile. *Weinberger v. Salfi, supra,* 422 U.S. at 764-66. Faced with a statute as clear and precise as the Blitz amendment, the VEC was forced to exclude appellee because she has advocated the violent overthrow of the government, albeit in

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training programs who do not want to run afoul of the statute through their future advocacy, prime sponsors would have to establish some form of pre-clearance system which would raise all the sensitive procedural problems that accompany systems of prior restraint. *See Freedman v. Maryland,* 380 U.S. 51 (1965).

a manner protected by the First Amendment. Moreover, the Secretary's suggestion (J.S. 15) that he might have averted this controversy if appellee had come to him rather than filing suit is disingenuous. The Secretary took no action to issue a limiting construction when the statute was enacted, when the VEC asked him for guidance, or when appellee applied to him for assistance. The Secretary arrived at his limiting construction of the Blitz amendment only after this lawsuit commenced, and events prior to the suit demonstrate the futility of exhausting administrative remedies.

Third, in addition to futility, there are additional reasons why this is not an appropriate case to require the exhaustion of administrative remedies. "The basic purpose of the exhaustion doctrine is to allow an administrative agency to perform functions within its special competence – to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies." *Parisi v. Davidson,* 405 U.S. 34, 37 (1972). This case involved no issues within the Secretary's special competence nor any factual questions. The fact that appellee has engaged in advocacy which comes within the ambit of the Blitz amendment was undisputed. (App. at 2a, 4a.) The only question was the constitutionality of the statute, and on this issue the federal courts rather than executive branch officials have special expertise. *See* note 10, *supra. Cf. Steffel v. Thompson,* 415 U.S. 452, 472-73 (1974) (exhaustion not required in cases under 42 U.S.C. § 1983 in recognition of "the paramount role Congress has assigned to the federal courts to protect constitutional rights.") Finally, there was no occasion for the Secretary to correct any errors, for prior to suit he simply refused to take a position on the Blitz amendment.

CONCLUSION

For the reasons stated above, the Court should dismiss the appeal. In the alternative, if the Court concludes that the case is not moot, it should affirm the judgment of the district court.

Respectfully Submitted,

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Attorneys for Appellee

December 4, 1982

APPENDIX A

TELEGRAPHIC MESSAGE

Name of Agency
U.S. DEPARTMENT OF LABOR
EMPLOYMENT AND TRAINING ADMINISTRATION
P.O. BOX 8796, PHILA., PA. 19101

ACTION: Rush

Date Prepared
May 19, 1982

Name
FRANCIS R. ZINNIE

Phone Number
596-6236

TO:
Mr. Ralph C. Robinson
Associate Commissioner
Virginia Employment Commission
111 South Sixth Street
Richmond, Virginia 23210

Subject: Blitz Versus U.S. Government

A recent District Court decision in the Blitz vs. U.S. Department of Labor case enjoined the Department to process Ms. Blitz's CETA application without regard to her political leanings or opinions. Therefore, you are to immediately inform Martinville [sic] local office to process Ms. Blitz CETA application without regard to political considerations.

James L. Whitsett
Grant Officer

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cc: S. Baker 1 1